Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1146

MELBA A. RAVEN,
Petitioner,

versus

PANAMA CANAL ZONE COMPANY/
CANAL ZONE GOVERNMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Melba A. Raven respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of the Canal Zone.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 2, 1978. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED

1. What is the appropriate level of judicial scrutiny of an agency's assertion of the national security exemption to the Freedom of Information Act?

2. May a Panamanian national avail herself of the Privacy Act to obtain access to government records pertaining to her employment by the Panama Canal Zone Company?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Freedom of Information Act:

§ 552(a)(4)(B):

> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

§ 552(b)(1):

> (b) This section does not apply to matters that are —
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> . . .

Privacy Act:

§ 552a(a)(2):

> (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for a permanent residence; . . .

STATEMENT OF THE CASE

The relevant history of this cause is concisely expressed in the opinion of the court of appeals. This history will be quoted from that opinion:

> Plaintiff, a Panamanian citizen employed by the Panama Canal Company, requested pursuant to the FOIA and/or Privacy Act, disclosure of documents relating to her transfer within the Panama Information Office. In response to plaintiff's request, the Company-Government Committee on Classified Information was convened to examine two documents to determine whether those documents were properly classified pursuant to Executive Order 11652, relating to national security. The Committee determined that the documents were properly classified and that there were no segregable portions which could be released. Plaintiff appealed this decision, whereupon the Committee met again to consider plaintiff's administrative appeal. The Committee confirmed that the documents were properly classified and that no portions could be segregated and released. After notification of the final agency decision denying her request, the plaintiff filed suit in Federal District Court seeking disclosure.
>
> At a hearing in the district court, counsel for both sides agreed that there was no dispute as

to any material facts and that the issue could be decided as a matter of law. Thus, summary judgment was the proper vehicle for the disposition of this case. *See Southern Distributing Co., Inc. v. Southdown Inc.*, 574 F.2d 824, 826 (5th Cir. 1978). The district court granted defendant's motion for summary judgment on the grounds that (1) plaintiff, a Panamanian citizen, is not an "individual" (*i. e.*, "a citizen of the United States or an alien lawfully admitted for permanent residence" 5 U.S.C. § 552a(a)(2)) within the meaning of the Privacy Act and therefore is not entitled to compel access under its authority; and (2) the two documents were properly classified pursuant to Executive Order 11652 and therefore exempt from disclosure under the FOIA. We affirm.

REASONS FOR GRANTING THE WRIT

1. This case presents the Court with an opportunity to resolve a divergence in the circuits on an issue of national importance — the extent of judicial scrutiny of agency claims to the national security exemption to the Freedom of Information Act. The Fifth Circuit, in its opinion below, has adopted a position on this issue that is a sharp departure from the practice in the First, Seventh, Ninth, Tenth and D. C. Circuits and is contrary to

the purpose of the 1974 amendments to the Act.

The history of the national security exemption is well described in Note, "National Security and The Amended Freedom of Information Act," 85 *Yale L.J.* 401 (1976):

> The Freedom of Information Act was originally enacted in 1966 to replace § 3 of the Administrative Procedure Act. Section 3 permitted the executive to withhold information to protect "any function of the United States requiring secrecy in the public interest." The (b)(1) exemption of the original FOIA was drafted to limit the areas in which information could be withheld and to force the executive to be more specific in its reasons for withholding information. Unlike § 3, the FOIA permitted information to be withheld only if "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."
>
> The Supreme Court in *EPA v. Mink* [410 U.S. 73 (1973)] interpreted this exception to mean that if documents had in fact been classified by an executive agency in a procedurally appropriate manner, the substantive adequacy of the classification would not be subject to judicial review. The Court held that the Freedom of Information Act did not authorize or permit *in camera* inspections of contested documents to enable courts to separate the secret from the nonsecret and order disclosure of the latter.

> The provisions affecting national security information in the Freedom of Information Act Amendments were written specifically to overrule *Mink*. They were designed to empower courts to exercise "effective judicial review of executive branch classification decisions" in order to rectify the "widespread overclassification abuses in the use of classification stamps." The Amendments gave the courts discretion to examine documents *in camera* for a de novo determination of their classification, placed the burden of proof on the executive to sustain the classification, and authorized courts to separate "any reasonably segregated portion of a record . . . after deletion of the portions which are exempt under this subsection." Most importantly, the Amendments altered the nature of the (b)(1) exemption itself. Henceforth documents can be withheld only if they are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

85 *Yale L.J.* at 401-03 (footnotes omitted).

The leading application of the exemption as thus amended is probably *Weissman v. Central Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977). That case discussed a variety of means by which the courts may ascertain whether materials withheld under the exemption are "in fact properly classified" as required by § 552(b)(1)(B) and, additionally, whether "any reasonable segregable non-exempt portion of an agency record should be released" pursuant to § 552(a)(4)(B), set forth fully, *supra*.

The opinion devotes considerable attention to *in camera* inspections, basically characterizing them as a permissible, but generally unpreferred means of determining agency compliance:

> It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an *in camera* examination to look for segregable non-exempt matter.

565 F.2d at 698.

As to how an agency could avoid such a vague record or sweeping claims, *Weissman* declared that "testimony and detailed affidavits" are a way in which the government may establish a public record "sufficient to permit a legal ruling" on the applicability of the exemption without resort to an *in camera* inspection. 565 F.2d at 696-97.

Applying these principles to the facts before it, the *Weissman* court allowed the agency's claim of exemption on the following basis:

> The CIA dealt with the instant request in a conscientious manner. It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. Agency documents have been released to plaintiff-appellant on four separate occasions. The Agency submitted affidavits summarizing each document, or portion of a document withheld, and indicated the rationale for each claimed exemption. It filed an indexed description of all material withheld, and supported the withholding by explicit affidavits. No discovery was attempted; plaintiff simply contested the adequacy of the affidavits. There is no reason, on this record, to presume bad faith on the part of the CIA. In this instance, the CIA released some documents in their entirety and portions of 22 others.

565 F.2d at 698.

The court thus emphasized the need for detailed explanation on the part of the agency. This rationale indicates that the extent to which the agency demonstrates its good faith by releasing segregable materials is another factor to be considered in deciding whether to allow its claims to the exemption.

In a subsequent case, the D.C. Circuit made it clear that the considerations applied in *Weissman* are not the only methods by which a court may satisfy itself of the legitimacy of a claimed exemption in the absence of an *in camera* inspection. After reciting the above facts or "the facts in the record that supported our holding" in *Weissman*, the D.C. Circuit stated that:

> In similar situations or where there are other compelling reasons not to doubt full administrative compliance with the segregability requirement of the FOIA, the choice whether to conduct *in camera* inspection should be left to the discretion of the district courts.

Mead Data Central, Inc. v. U.S. Department of Air Force, 566 F.2d 242, 262 n. 59 (1977).

This language does not condone a lesser standard of searching than that applied in *Weissman*. To the contrary, the *Mead* court found no "compelling reasons not to doubt full administrative compliance" in the case before it. The D.C. Circuit was not impressed with the vague claims of the attorney-client privilege and the internal memorandum exception to the Freedom of Information Act made by the Air Force:

> [I]f the Air Force decides to continue in its claim that the non-exempt material in these documents is not reasonably segregable after reconsideration pursuant to the remand of

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> this case, it must provide a more detailed justification than the conclusory statements it has offered to date.

566 F.2d at 261.

The court offered the following rationale for its stern refusal to rubber stamp the Air Force's claim:

> We recognize that this requirement presents problems for the agency since, as noted above, segregability depends entirely on what information is in a document and how it is presented. Of course agencies should not be forced to provide such a detailed justification that would itself compromise the secret nature of potentially exempt information. Nevertheless, unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.

566 F.2d at 261.

Mead did not involve the national security exception, but the case cannot be distinguished on that ground. *Weissman* makes it clear that in the D.C. Circuit all government claims of exemption are viewed suspiciously and the courts do not defer at the mere utterance of "national security."

The other circuits have adopted a similar approach. In *DiViaio v. Kelley*, 571 F.2d 538 (10th Cir. 1978), the court, citing *Weissman*, required a detailed description in an affidavit before legitimating a claim to the national security exemption in the absence of *in camera* inspection. In *Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977), the FBI had released numerous documents to plaintiff but withheld various other materials on the basis of several exceptions. Notable among these was a document originating with the CIA, withheld under the national security exemption. The court held the document was properly classified, but only on the basis of a detailed affidavit.

In *Ollestad v. Kelley*, 573 F.2d 1109 (9th Cir. 1978), the court refused to accept the FBI's vague claims of exemption, emphasizing the importance of detailed justification on the part of the agency:

> The burden of proof is on the agency claiming exemptions from the statutorily-imposed duty to disclose information, and the court must apply that burden with an awareness that the plaintiff is at a distinct disadvantage in attempting to controvert the agency's claims. *See generally Cuneo v. Schlesinger*, 157 U.S.App.D.C. 368, 373, 484 F.2d 1086, 1091 (1973), *cert. denied sub nom. Rosen v. Vaughn*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974); *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 343-347, 484 F.2d 820, 823-27 (1973), *cert. denied*,

> 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). It would have been difficult for the district court to have evaluated the merits of defendants' claims of exemptions in this case because they have not yet submitted an index of withheld documents or detailed justifications for their nondisclosure.
>
> Therefore, we remand appellant's FOIA action to the district court for further proceedings. That court may require the defendants to prepare an index with detailed justifications for withholding documents so that an *in camera* inspection can be made, or it may require more detailed affidavits or testimony justifying continued retention of requested documents. *E.P.A. v. Mink*, 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

573 F.2d at 1110.

Bell v. United States, 563 F.2d 484 (1st Cir. 1977) involved a suit to compel disclosure of certain documents gathered and collated by the Allied Intelligence Services under the so-called "ULTRA" program during World War II. The Court sustained the government's claim of the national security exemption, but only on the following basis:

> On June 21, 1976, defendants responded to the court's order by submitting the affidavit of Norman Boardman, Information Officer of

the National Security Agency. The affidavit states that the documents were determined to be properly classified pursuant to EO 11652 on the ground that "unauthorized disclosure of the documents and information contained therein could reasonably be expected to cause exceptionally grave damage to the national security because they would disclose complex cryptographic and communications intelligence systems, methods and sources." The affidavit further recites the procedure under which the Secretary of Defense had reviewed the documents and determined that they should be exempted from automatic declassification pursuant to EO 11652 and extended the classification until 1980. The Secretary had however, "requested that a definite plan for the review and declassification of the documents requested promptly be undertaken to determine whether such documents could be declassified in whole or in part before the extended date." Finally, the affidavit recites that, although Boardman did not examine each and every one of the 500,000 separate documents encompassed by appellant's request, he had personally examined a "representative sampling of the various types of documents" and determined that "because of the nature of the communications intelligence information and operations to which such documents refer, it would be im-

> possible and impracticable to segregate out portions . . . which might conceivably be considered to relate to nonclassified information until the review directed by the Secretary of Defense has been completed."

563 F.2d at 486.

It is difficult to imagine in these circumstances more "compelling reasons not to doubt full administrative compliance" than the Secretary's assurance that the awesome task of segregation and declassification of 500,000 separate documents had been set in motion.

Citing *Weissman*, the *Bell* court described the role of review in the First Circuit as follows:

> We agree with the District of Columbia Circuit that the test should be whether the affidavit demonstrates by its sufficient description [that] the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an *in camera* inspection "it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Id. See also* S.Rep. No. 93-854, 93d Cong., 2d Sess. 16 (standard of review does not allow court to substitute its judgment for that of the agency, but neither does it require the court to defer to this discretion of the agency; test is whether the with-

> holding is without a reasonable basis under the applicable executive order or statute).

563 F.2d at 487.

As illustrated by the cases discussed above, the circuit courts have adhered to the policy of careful judicial review of agency assertions of national security, vigorously demanding justification of agency claims to the exception.

The Fifth Circuit in the instant case, however, has not been so vigilant of petitioner's statutory rights. Specifically, it upheld the government's claim of the privilege in this case on the basis of an affidavit which merely indicated,

> that the documents contain information pertaining to intelligence sources and methods, the unauthorized release of any intelligible excerpt from which, at a minimum, could reasonably be expected to cause damage to the national security.

___ F.2d at 624, App. 7a, *infra*.

Compare this conclusory statement to the "compelling reasons" and detailed justifications demanded in the other circuits. Contrast, for instance, the boneless assertion that "the documents contain information pertaining to intelligence sources and methods" with the affidavits presented by the CIA in *Maroscia, supra*, in

which "each of the textual paragraphs is described in some detail, indicating the circumstances and sensitivity of the information." 569 F.2d at 1003. For an even sharper distinction, compare the Fifth Circuit's unquestioning acceptance of the government's remarkable conclusion that the materials were absolutely non-segregable, that not the slightest "intelligible excerpt" could be released without jeopardizing national security, with the manner in which the *Weissman* court permitted the CIA's claim of privilege only after the agency, in addition to identifying, indexing, and explaining each piece of withheld information, further demonstrated its good faith by releasing segregable material: "some documents in their entirety and portions of 22 others." 565 F.2d at 698.

It is indeed ironic that the opinion below purports to rely on *Weissman*. The following language from *Weissman* illustrates this misplaced reliance:

> It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an *in camera* examination to look for segregable non-exempt matter.

565 F.2d at 698.

It is hard to imagine a record more vague or agency claims more sweeping than those involved here. In other words, a situation where *Weissman* would call for the "last resort" of *in camera* review, the Fifth Circuit did

not even seek a more detailed affidavit; it simply deferred to the agency, and incorrectly cites *Weissman* as authority.

The opinion below suggests that petitioner did not challenge the affidavit, but merely sought *in camera* review. This is a rather facile point, since the only purpose of *in camera* review is to challenge the agency's characterization of the materials claimed to be exempt. Furthermore, in view of the "vague record and sweeping claims" of the agency in this case, an *in camera* review was the only means of challenging the government's conclusory affidavit. *See Weissman, supra*, 565 F.2d at 698. *See also Ollestad v. Kelley, supra*, 573 F.2d at 1110.

Finally, petitioner's claim finds support in "the basic policy that disclosure, not secrecy is the dominant objective of the [Freedom of Information] Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *accord, N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Thus, petitioner urges this Court to grant the writ of certiorari in this case in order to resolve this important question of interpretation of the national security exemption to the Freedom of Information Act. The Fifth Circuit's decision in this case differs significantly from the scope of judicial review articulated by several other circuit courts. In addition, the lower court's ruling flies in the face of the basic policy of disclosure embodied in the FOIA. For these reasons, this Court is urged to accept jurisdiction in order to reverse the decision below.

2. The judgment below ruling that petitioner may not avail herself of the Privacy Act violates the Equal Protection Clause and is inconsistent with the Memorandum of Understanding signed by the United States and Panama on January 25, 1975.

The Privacy Act is limited to "individuals" within the following definition:

> (2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence; . . .

5 *U.S.C.* § 552a(a)(2).

Petitioner, as a Panamanian national, does not fit within this definition. There are two reasons, however, why this provision should not exclude her from the protections of the Act.

The first is the following provision of Section 138 of the Memorandum of Understandings Reached Ancillary to the Treaty of Mutual Understanding and Cooperation signed by the United States and Panama on January 25, 1955. 6 U.S.T. 2273, 2330 T.I.A.S. No. 3297 at 58, which reads, in relevant part:

> The United States will afford equality of opportunity to citizens of Panama for employment in all United States Government positions in the Canal Zone for which they are

> qualified and in which the employment of United States citizens is not required, in judgment of the United States, for security reasons.

Because this provision guarantees petitioner equal employment opportunity with United States citizens, insofar as she seeks documents pertaining to her employment opportunities with the Canal Zone Company, the Privacy Act should be read so as to give her the same access to such documents as enjoyed by United States citizens. Thus, it has been held by this Court that:

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. *Chew Heong v. United States*, 112 U.S. 536; *United States v. Payne*, 264 U.S. 446, 448.

Cook v. United States, 288 U.S. 102, 120 (1933).

The second reason why petitioner should have access to the Privacy Act is the Equal Protection Clause, which applies in the Canal Zone just as it does in any area under American domain. As was said in *Balzac vs. Puerto Rico*, 258 U.S. 298, 312 (1922): "The Constitution of the United States is in force in Puerto Rico as it is wherever and whenever the sovereign power of that government is exerted." While the Constitution may not necessarily

guarantee all the rights in the territories that it provides in the states, those rights which are provided are provided to all.

The Fifth Circuit echoed this sentiment in *Government of the Canal Zone v. Scott*, 502 F.2d 566, (5th Cir. 1974):

> The constitution does not require the extension of all protections of the bill of rights to territories governed by the United States. In Soto v. United States, 3 Cir. 1921, 273 F. 628, 633, the court held that indictment by a grand jury is "not among the fundamental rights which Congress is legislating for a territory not incorporated into the United States must secure to its inhabitants". Moreover, non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.

502 F.2d at 568.

In other words, while inhabitants of the territories may be denied those rights which are not fundamental, they may not be denied the most fundamental right of all, equality under the law.

Petitioner has not been "treated alike" with her neighbors who are United States citizens. She has been

denied access to the Privacy Act solely on the basis of her nationality, which puts this case in line with the decisions of this Court which have "established that classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

The standard of review was recently applied by this Court to strike down a territorial law prohibiting aliens from engaging in certain lawful occupations. In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), this Court held that a Puerto Rican statute which prohibited aliens from engaging in the practice of engineering violated the Constitutional guarantees of equal protection and due process. The Court noted that state classifications based on alienage are subject to "strict judicial scrutiny" and will be upheld "only if the State or Territory imposing them is able to satisfy the burden of demonstrating 'that its purpose or interest is both constitutionally permissible and substantial,' and that its use of the classification is 'necessary . . . to the accomplishment of its interest.' *In re Griffiths*, 413 U.S. at 721-22 . . . ." 426 U.S. at 602.

In the present case, the government has failed to justify the discrimination against the petitioner. The effect of this discrimination is to severely handicap petitioner's equal employment opportunities, in violation of treaty agreements and constitutional principles.

Thus, application of the narrow definition of "individual," as employed in the Privacy Act, violates petitioner's rights to equal protection and due process.

CONCLUSION

A writ of certiorari should issue to the Fifth Circuit to review the judgment and opinion in the present case. Such review will give this Court an opportunity to resolve a split among the circuits on an important question of national importance, namely, the scope of judicial review of agency determinations of national security under the Freedom of Information Act. In addition, review will enable this Court to do justice to the petitioner, who has been seriously injured by the lower court's departures from the Act's basic policy of disclosure. Finally, this Court should examine the Privacy Act definition of "individual" in light of its impact on rights secured to the petitioner by treaty and the Constitution.

Respectfully submitted,

Jack B. Hood
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Balboa, Canal Zone
Counsel for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that the undersigned has served three copies of this Petition on counsel for Respondent, Panama Canal Company/Canal Zone Government by sending three copies to Frank J. Violanti, United States Attorney at P. O. Box 2090, Balboa, Canal Zone, and three copies to Dwight A. McKabney, General Counsel for the Panama Canal Company, at P. O. Box M, Balboa Heights, Canal Zone. It is further certified that the undersigned has served three copies of this Petition on the Solicitor General of the United States of America, by sending three copies of the same to him at the Department of Justice, Washington, District of Columbia, zip code: 20530. Such service has been accomplished by depositing the said copies in a postal system of the United States of America, with air mail prepaid postage to the addresses aforesaid, this ____ day of January, 1979.

JACK B. HOOD
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BALBOA, CANAL ZONE

APPENDIX

Melba A. RAVEN, Plaintiff-Appellant,

versus

PANAMA CANAL COMPANY/
Canal Zone Government, Defendants-Appellees.

No. 78-1656
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 2, 1978.

Appeal from the United States District Court for the District of the Canal Zone.

Before RONEY, GEE and FAY, Circuit Judges.

FAY, Circuit Judge:

This is an appeal from the granting of defendant's motion for summary judgment. The issues presented involve the interpretation of the Privacy Act of 1974, 5 U.S.C. § 552a and the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Specifically, we consider whether a Panamanian citizen is entitled to rights under the Privacy Act and whether an *in camera* proceeding is necessary to determine if the foreign policy/national

* Rule 18, 5 Cir., *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

defense exemption of the FOIA, 5 U.S.C. § 552(b)(1)(A) has been properly invoked.

Plaintiff, a Panamanian citizen employed by the Panama Canal Company, requested pursuant to the FOIA and/or Privacy Act, disclosure of documents relating to her transfer within the Panama Information Office. In response to plaintiff's request, the Company-Government Committee on Classified Information was convened to examine two documents to determine whether those documents were properly classified pursuant to Executive Order 11652, relating to national security. The Committee determined that the documents were properly classified and that there were no segregable portions which could be released. Plaintiff appealed this decision, whereupon the Committee met again to consider plaintiff's administrative appeal. The Committee confirmed that the documents were properly classified and that no portions could be segregated and released. After notification of the final agency decision denying her request, the plaintiff filed suit in Federal District Court seeking disclosure.

At a hearing in the district court, counsel for both sides agreed that there was no dispute as to any material facts and that the issue could be decided as a matter of law. Thus, summary judgment was the proper vehicle for the disposition of this case. *See Southern Distributing Co., Inc. v. Southdown Inc.*, 574 F.2d 824, 826 (5th Cir. 1978). The district court granted defendant's motion for summary judgment on the grounds that (1) plaintiff, a Panamanian citizen, is not

an "individual" (*i.e.*, "a citizen of the United States or an alien lawfully admitted for permanent residence" 5 U.S.C. § 552a(a)(2)) within the meaning of the Privacy Act and therefore is not entitled to compel access under its authority; and (2) the two documents were properly classified pursuant to Executive Order 11652 and therefore exempt from disclosure under the FOIA. We affirm.

Although plaintiff claims that she should be entitled to the protection of the Privacy Act, the statutory language is to the contrary. The Privacy Act permits an "individual" to gain access to agency records containing information pertaining to him (5 U.S.C. § 552a(d)(1)), and those "individuals" denied access to certain official records are accorded the right to bring a civil action to compel disclosure. 5 U.S.C. § 552a(g)(1). However, the statute defines "individual" to be "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a (a)(2). Since the plain and unambiguous meaning should be given effect to words of a statute, *Caruth v. United States*, 566 F.2d 901 (5th Cir. 1978); *United States v. Second National Bank of North Miami*, 502 F.2d 535 (5th Cir. 1974), *cert. denied* 421 U.S. 912, 95 S.Ct. 1567, 47 L.Ed.2d 777 (1975), and since the plaintiff is a Panamanian citizen and thus not an "individual" within the meaning of the Privacy Act, she is not entitled to compel access under its authority.

Furthermore, this Court has expressly commented on the use of the word "individual" in the Privacy Act, as opposed to the word "person," as more broadly used

(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive Order.

5 U.S.C. § 552 (b)(1).

Our Circuit has not yet ruled expressly on exemption one of the FOIA as it applies to these facts. We are impressed, however, with the holdings of several other Circuits. *See, e.g., DiViaio v. Kelley,* 571 F.2d 538 (10th Cir. 1978); *Maroscia v. Levi,* 569 F.2d 1000 (7th Cir. 1977); *Weissman v. C.I.A.,* 184 U.S. App. D.C. 117, 565 F.2d 692 (1977); *Bell v. United States,* 563 F.2d 484 (1st Cir. 1977). *Weissman,* a widely followed case, stated that the standard for determining whether a document is properly classified and protected by exemption one is whether the proper classification procedures have been followed and if "by its sufficient description the contested document logically falls into the category of the exemption indicated." *Id.* 184 U.S. App. D.C. at 122, 565 F.2d at 697. The plaintiff in the instant case has not challenged the procedural classification of these documents, and the record suggests that the documents have been properly classified pursuant to Executive Order 11652.

According to Executive Order 11652 section 1(C), the threshold test for classifying information is

"whether its unauthorized disclosure could reasonably be expected to cause damage to the national security." Uncontested affidavits of the government officials responsible for intelligence and security matters in the Panama Canal Zone demonstrate that the documents at issue logically fall into the categories of information which are protected by Executive Order 11652. Indeed, it is indicated that the documents contain information pertaining to intelligence sources and methods, the unauthorized release of any intelligible excerpt from which, at a minimum, could reasonably be expected to cause damage to the national security.

Plaintiff has not specifically challenged the classification of the documents on the ground that the documents do not logically fall into categories subject to classification. Rather, plaintiff argues that the district court committed reversible error in failing to conduct an *in camera* examination of the documents. We do not agree. An *in camera* inspection of questioned documents is not a mandatory requirement of the FOIA. On the contrary, as propounded by the court in *Weissman,* "it is clear from the legislative history that this section merely 'permit[s] such *in camera* inspection at the discretion of the Court.' " 184 U.S. App.D.C. at 121, 565 F.2d at 696. Further, the *Weissman* Court noted the Congressional suggestion that before the Court orders an *in camera* inspection, "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." *Id.* 184 U.S. App. D.C.

at 122, 565 F.2d at 697. We agree with this approach. In the instant case, the government has provided such affidavits, and the district court determined that "[t]hese uncontradicted affidavits establish that the documents sought by plaintiff have been properly classified pursuant to Executive Order." Such reliance here was proper. Indeed, "further inquiry would, it seems, require the court to do nothing more than substitute its judgment of the risk to national security for that of the agency. This, certainly, is not what the *in camera* review amendment was intended to accomplish." *Bell v. United States,* 563 F.2d at 487. In the instant case no *in camera* examination was obligatory since the uncontested affidavits established that the documents in question were properly classified pursuant to Executive Order 11652 and thus were properly exempted from disclosure under the FOIA, 5 U.S.C. § 552(b)(1).

On the basis of the record before it, the district court did not err in granting summary judgment in favor of the defendants. The decision is AFFIRMED.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-1146

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELBA A. RAVEN, PETITIONER

v.

PANAMA CANAL COMPANY and
GOVERNMENT OF THE CANAL ZONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a Panamanian citizen, sought release of two documents in respondents' possession pursuant to the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a. The district court granted summary judgment for respondents, holding that the documents are protected from disclosure by the Freedom of Information Act's exemption relating to foreign policy and national defense, and that petitioner is not an "individual" within the meaning of the Privacy Act and therefore is not entitled to access under that statute (Pet. App. 2a-3a). The court of appeals affirmed (583 F. 2d 169; Pet. App. 1a-8a).

Petitioner contends (Pet. 5-18) that the court of appeals' decision conflicts with decisions of other circuits requiring more stringent and detailed judicial review of

agency claims that documents are protected by the foreign policy and national defense exemption to the Freedom of Information Act, 5 U.S.C. 552(b)(1)(B). This contention is incorrect. The court of appeals followed the procedures approved in *Weissman* v. *CIA*, 565 F. 2d 692 (D.C. Cir. 1977); *DiViaio* v. *Kelley*, 571 F. 2d 538 (10th Cir. 1978); *Maroscia* v. *Levi*, 569 F. 2d 1000 (7th Cir. 1977); and *Bell* v. *United States*, 563 F. 2d 484 (1st Cir. 1977), the cases on which petitioner relies (Pet. 8-17).[1] In the leading case, *Weissman* v. *CIA*, *supra*, 565 F. 2d at 697, the court concluded:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an *in camera* inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

The court of appeals applied precisely this standard in the instant case (Pet. App. 6a). As the court noted (*ibid.*), petitioner does not contend that the proper classification procedures were not followed. And the agency's affidavits show that the two documents initially were classified by a duly authorized classification officer, that the documents were properly marked pursuant to the Executive Order, and that the classification was twice reviewed and reaffirmed by the Company-Government Committee on Classified Information (see Pet. App. 2a). The court correctly found that the affidavits establish that "the documents contain information pertaining to intelligence

[1]Petitioner also cites (Pet. 10-12) *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F. 2d 242 (D.C. Cir. 1977), and *Ollestad* v. *Kelly*, 573 F. 2d 1109 (9th Cir. 1978). These cases are inapposite, because they do not deal with the foreign policy and national defense exemption.

sources and methods, the unauthorized release of any intelligible exerpt from which, at a minimum, could reasonably be expected to cause damage to the national security" (Pet. App. 7a). Accordingly, the court concluded that these documents fall within the claimed exemption, and that the district court did not need to conduct an *in camera* inspection.

Petitioner argues that in the cases from other circuits where the agency's claim under the foreign policy and national security exemption was upheld, the agency supported its claim by preparing a detailed index and by releasing portions of many requested documents. But the cases petitioner cites involved as many as 500,000 documents, and such cases require detailed indices for proper judicial review. See *Bell* v. *United States*, *supra*, 563 F. 2d at 486. Petitioner's request, in contrast, involves only two documents (Pet. App. 2a). The courts below, applying the proper standard, held these two documents were exempt. Aids like an index, which are useful when a request is made for a large number of documents, were simply unnecessary here.

Petitioner also contends (Pet. 19-23) that the court of appeals erred in holding that, as a Panamanian national, she is not an "individual" entitled to disclosure of information under the Privacy Act. There is no need to reach that question in the instant case. The Privacy Act expressly provides that material covered by the foreign policy and national defense exemption to the Freedom of Information Act is exempt from disclosure under the Privacy Act if the agency head promulgates regulations exempting the relevant records. 5 U.S.C. 552a(k)(1). Since the documents in question have been exempted from disclosure by regulation, 35 C.F.R. 10.14(a)(1)(i), they are not subject to Privacy Act disclosure.

In any event, there is no merit to petitioner's claim that she is entitled to invoke the Privacy Act. The Act may be invoked by an "individual," a term that is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. 552a(a)(2). It is undisputed that petitioner, who is a Panamanian national, does not fit this definition (see Pet. 19). She nevertheless maintains (Pet. 19) that she must be permitted to invoke the Privacy Act, regardless of the clear statutory language, because a provision of a Memorandum of Understandings between the United States and Panama[2] generally affords equality of employment opportunity in United States government positions to Panamanian citizens in the Canal Zone. This argument is frivolous, because the purpose of the Privacy Act is to afford protection against invasions of personal privacy, not to create employment opportunties.

Petitioner also argues (Pet. 20-23) that the denial of Privacy Act rights to Panamanian nationals violates the Due Process Clause.[3] But nothing in the Due Process Clause of the Fifth Amendment precludes Congress from differentiating between foreign nationals residing overseas and United States citizens or aliens who are permanent lawful residents of the United States. Cf. *Mathews* v. *Diaz*, 426 U.S. 67, 78-79 (1976) ("[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other * * *.").

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[2]The Memorandum is reprinted at 6 U.S.T. 2273, 2330, T.I.A.S. No. 3297 at 58.

[3]Although petitioner refers to the "Equal Protection Clause," her complaint that the Privacy Act is invalid would be cognizable only under the Due Process Clause of the Fifth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979